



# DECISION

*Fair Work Act 2009*

s.376 - Application for costs orders against lawyers and paid agents

**The Trustee for Hanna 5 Trust T/A Little Henri**

**v**

**The Trustee for B Positive Trust T/A Positive HR Pty Ltd**

(C2023/4639)

COMMISSIONER LEE

MELBOURNE, 17 AUGUST 2023

*Application for costs orders against lawyers or paid agents- representative not a paid agent- powers not enlivened-application for costs is dismissed*

[1] This decision concerns an application lodged on 21 February 2023 by The Trustee for Hanna 5 Trust trading as Little Henri (Little Henri) for costs orders pursuant to s.376 of the *Fair Work Act (Cth)* (Act) against Ms Jessica Bilston-Gourley of The Trustee for B Positive Trust trading as Positive HR Pty Ltd (Positive HR).

## Background

[2] On 17 November 2022 Mr Joshua Bilston-Gourley lodged a Form F8 General Protections Application involving dismissal. In the Form F8 Mr Joshua Bilston-Gourley claimed that his dismissal took effect on 16 November 2022. He answered “yes” to the question “do you have a representative”. The details he provided named Ms Jessica Bilston-Gourley of Positive HR as his representative. He also answered “yes” to the question, “Is your representative a lawyer or paid agent?”.

[3] Little Henri lodged a Form F8A where they raised a jurisdictional objection to the application. The basis of the objection was that Mr Joshua Bilston-Gourley was not dismissed. It included by way of explanation: “The Respondent was not dismissed. The Respondent has been rostered to work and has been putting in medical certificates to cover his current absence.”<sup>1</sup> It is presumed that the reference to Respondent was intended to be a reference to Applicant.

[4] The Fair Work Commission (Commission) generally does not have a determinative function in relation to applications brought under s.365 of the Act unless the parties agree to the Commission arbitrating the matter. Rather, the Commission’s role is to convene a Conference and to issue a certificate to the Applicant, if it is satisfied that all reasonable efforts to resolve the dispute have been or are likely to be unsuccessful. However, where the Respondent denies that it dismissed the Applicant and objects to the application on this basis, the Commission is required to determine whether the Applicant was dismissed.<sup>2</sup>

[5] Accordingly, a Mention Hearing was listed for the purpose of setting directions to deal with the jurisdictional objection. At the Mention Hearing I asked Ms Jessica Bilston-Gourley

in what capacity she was appearing. She advised that she was a paid agent.<sup>3</sup> Mr Joseph Kelly of Kelly Workplace Lawyers appeared for the Little Henri. I granted both parties permission to be represented.<sup>4</sup>

[6] The Mention Hearing on 15 December 2022 was conducted by Microsoft Teams. There were difficulties at times with connection which were only exaggerated by Ms Jessica Bilston-Gourley trying to participate in the Mention Hearing while simultaneously driving her car. Ms Jessica Bilston-Gourley ceased driving after I directed her to do so.<sup>5</sup>

[7] Ultimately, Directions were set for the filing of materials to deal with the jurisdictional objection as follows:

[2].....

1. The Respondent shall file in the Commission and serve on the Applicant an outline of submissions and any witness statements and other documentary material on which the Respondent intends to rely, by **no later than 5.00pm, Friday, 20 January 2023.**

2. The Applicant shall file in the Commission and serve on the Respondent, an outline of submissions and any witness statements and other documentary material on which the Applicant intends to rely, by **no later than 5.00pm, Friday, 27 January 2023.**

3. The Respondent shall file in the Commission and serve on the Applicant any material in reply, by **no later than 5.00pm, Friday, 3 February 2023.**

[8] On 20 January 2023 Little Henri filed material in accordance with the Directions. That material included submissions supporting the jurisdictional objection and the witness statement of Mr Walid Hanna. Ms Jessica Bilston-Gourley failed to file any material by 5.00pm Friday 27 January 2023. Ms Jessica Bilston-Gourley did not make any contact with my Chambers to seek an extension of time for the filing of materials. Consequently, on the 31 January 2023, the parties attended a Non-Compliance Hearing at my direction.

[9] At the Non-Compliance Hearing, Ms Jessica Bilston-Gourley stated she had failed to meet the deadline because she had travelled to the Gold Coast on the occasion of her aunt's death. Ms Jessica Bilston-Gourley made various significant claims about her own health, the health of Mr Joshua Bilston-Gourley and of another relative. Ms Jessica Bilston-Gourley claimed that she was barely operating and functioning for more than 30 minutes per day.<sup>6</sup> The application for an extension of time to file was opposed by Counsel for Little Henri.

[10] Counsel drew attention to the fact that the Mr Joshua Bilston-Gourley was represented by a "...full service HR business called Positive HR" and there was no reason that other employees in the business could not attend to the matter. Indeed, Ms Jessica Bilston-Gourley made reference to her "support team" in the business which included one employee and one contractor.<sup>7</sup> Further, Ms Jessica Bilston-Gourley had told Counsel for Little Henri that she already had witness statements, therefore, there was no reason for the delay. I note that Ms Jessica Bilston-Gourley stated in the Mention Hearing on 15 December 2022 that she had witness statements of individuals who "witnessed the termination".<sup>8</sup> An extension of two weeks to file materials was sought by Ms Jessica Bilston-Gourley. Ultimately, I indicated that I would

allow a further one-week extension from the day of the Non-Compliance Hearing provided that Ms Jessica Bilston-Gourley provided medical evidence to support her claims. Ms Jessica Bilston-Gourley indicated she was “happy to provide a certificate”<sup>9</sup>. It was made clear that the extension was dependent on the medical evidence being provided.

[11] During the Non-Compliance Hearing, Ms Jessica Bilston-Gourley’s conduct was for the most part, belligerent and not the behaviour one would reasonably expect from a member of the public, let alone someone who holds themselves out to the world as a HR professional.<sup>10</sup>

[12] Ms Jessica Bilston-Gourley failed to provide any medical evidence in accordance with the directions on or before 3 February 2023. On 7 February 2023, Ms Jessica Bilston-Gourley filed a Form F50 notice of discontinuance withdrawing matter number C2022/7662 selecting the option to “wholly discontinue the matter to pursue an alternate application.”

[13] Subsequently, on 21 February 2023 Little Henri lodged a costs application against Ms Jessica Bilston-Gourley of Positive HR on a number of grounds which are set out in the consideration below.

[14] The costs application was listed for Mention Hearing on 7 March 2023. The Hearing was adjourned at the request of Ms Jessica Bilston-Gourley who emailed my chambers on 28 February 2023 stating “I will be getting a lawyer. I am going to need an adjournment to have time to find legal representation. I request an adjournment of the mention hearing to have sufficient time to get legal representation.” The Mention Hearing was relisted for 21 March 2023. No lawyer appeared for Ms Jessica Bilston-Gourley however, she advised that she had sought legal advice. After a brief exchange between myself and Counsel for Little Henri as to the possible timing for the filing of materials in the matter, Ms Jessica Bilston-Gourley sought to have the matter “removed” on the basis that she was not in fact a paid agent. Ms Jessica Bilston-Gourley then commenced to engage in the same sort of belligerent behaviour she engaged in at the Hearing on 31 January 2023 interrupting and speaking over others, including myself. Despite my attempts to explain to Ms Jessica Bilston-Gourley that the matter needed to be programmed to allow both parties to be heard in respect of the cost’s application, she continued to insist that the matter be immediately dealt with and that she was “not sure why we cannot make a decision on it today”.<sup>11</sup>

[15] Ms Jessica Bilston-Gourley then advised me that she had made a written request that I be removed from dealing with the matter.<sup>12</sup> I was unaware of that request prior to the Hearing commencing. I therefore determined that I would need to determine that recusal application before proceeding further.

[16] Subsequently, I issued a Decision in which I declined to recuse myself from further hearing the matter and dismissed the recusal application.<sup>13</sup> Directions were then set for the lodgement of materials to deal with the cost’s application. On 26 April 2023, my Chambers emailed Directions to the parties. I directed Little Henri to file their materials by 10 May 2023 and for Positive HR to file their materials by 24 May 2023. The Hearing took place on 16 June 2023 where Mr Joseph Kelly, Ms Jessica Bilston-Gourley and Mr Joshua Bilston-Gourley gave evidence.

[17] Subsequent to me reserving a decision in the matter, Ms Jessica Bilston-Gourley engaged in repeated emailing to my chambers requesting that the decision be issued. When my Chambers advised her of the Commissions timeliness benchmarks, Ms Jessica Bilston-Gourley responded that the Commission timelines were “ridiculous”.

**[18] The law to be applied**

Section 376 of the Act provides:

- “• Costs orders against lawyers and paid agents
- (1) This section applies if:
  - (a) an application for the FWC to deal with a dispute has been made under section 365 or 372; and
  - (b) a person who is a party to the dispute has engaged a lawyer or paid agent (the representative) to represent the person in the dispute; and
  - (c) under section 596, the person is required to seek the FWC’s permission to be represented by the representative.
- (2) The FWC may make an order for costs against the representative for costs incurred by the other party to the dispute if the FWC is satisfied that the representative caused those costs to be incurred because:
  - (a) the representative encouraged the person to start, continue or respond to the dispute and it should have been reasonably apparent that the person had no reasonable prospect of success in the dispute; or
  - (b) of an unreasonable act or omission of the representative in connection with the conduct or continuation of the dispute.
- (3) The FWC may make an order under this section only if the other party to the dispute has applied for it in accordance with section 377.
- (4) This section does not limit the FWC’s power to order costs under section 611.”

Section 12 of the Act provides:

- “• paid agent”, in relation to a matter before the FWC, means an agent (other than a bargaining representative) who charges or receives a fee to represent a person in the matter.”

**The submissions and the evidence on the costs application.**

[19] Little Henri claims that Ms Jessica Bilston-Gourley caused costs to be incurred by her unreasonable acts or omissions in:

- a. Filing the General Protections Claim knowing that there had been no termination of employment and therefore the application had no prospects of success;
- b. Claimed to have evidentiary material she did not have and/or could not produce;

- c. Failing to comply with the Orders and the Amended Orders;
- d. Failing to withdraw the claim in a timely manner.

[20] In support of their claim Little Henri submitted the following:

“• 31. The application in matter number C2022/7662 was made on the basis that the Applicant (to proceedings) was dismissed.

32. If it was found that there was no dismissal, the application would have been jurisdictionally barred from being heard by the Commission.

33. It ought to have been obvious to the Respondent that her client was not dismissed, or alternatively, would fail on the question of whether he was dismissed for the following reasons:

- a. There was no evidence of a dismissal. Though the Respondent emailed the Applicant’s lawyers on various occasions alleging that evidence of dismissal existed, none of it was ever produced including when the orders of the Commission required it to be produced;
- b. To the contrary, the Applicant had, and put on, evidence of the Applicant (to proceedings) being asked to return to work after an offer of mutual termination was not agreed;<sup>14</sup> and
- c. Instead of responding to that evidence, which would have been a relatively easy task if the evidence the Respondent says existed, did exist, the Respondent withdrew her client’s claim.

34. It is the Applicant’s submission that:

- a. No evidence of dismissal existed at the time the Respondent caused her client’s claim to be filed and that the Respondent knew such evidence didn’t exist;
- b. It ought to have been obvious to the Respondent that her client’s claim would fail because her client would not succeed on the jurisdictional hurdle of there being a dismissal; and
- c. The Respondent’s threats of evidence to the Applicant should be read as an attempt to create leverage for her client out of nothing. The Respondent’s filing of her client’s claim was an attempt to do the same, abandoned at the first opportunity the claim was put to proof.”

“• 35. The Respondent made a number of representations to the Applicant prior to and in the course of proceedings that fundamentally altered the way in which the matter was defended by the Applicant. Those representations were (“the Representations”):

- a. On 18 November 2022, that a witness to the dismissal had been obtained;<sup>15</sup> and
- b. On 20 November 2022, that “witnesses evidenced this [dismissal] and we have statements.”<sup>16</sup>

36. The Respondent made a number of omissions in the course of proceedings that caused the Applicant to incur costs. Those omissions were (“the Omissions”):

- a. failing to file her client’s evidentiary material as ordered by orders dated 20 December 2022, or at any other time (“the Failure to File”);<sup>17</sup>
- b. failing to provide medical evidence justifying an extension as ordered by orders dated 31 January 2023 (“the Failure to Produce”); and
- c. failing to withdraw her client’s claim in a timely fashion (“Failure to Withdraw”). There was no reason the claim could not have been withdrawn far earlier in proceedings – the Applicant’s (to proceedings) claim never improved so whatever reason the Respondent had for withdrawing the claim, was a reason that existed on the commencement of the claim.

37. The Representations and the Omissions were unreasonable because:

- a. The Representations were untrue or, alternatively, if true, never relied on during proceedings. It was unreasonable to refer to and foreshadow evidence where such evidence never formed part of the Applicant’s (to proceedings) claim;
- b. No reasons were ever provided for the Omissions; and
- c. The withdrawal of the claim by the Respondent ought to have occurred far earlier in proceedings.

38. The Representations caused the Applicant to incur costs because:

- a. The Applicant was entitled to accept that the Respondent did have evidence as claimed, and that the evidence would be filed with the Commission. The Applicant in anticipation of the Representations placed significant resources in defending that evidence through its own evidentiary material; and
- b. The Applicant’s lawyers could not reasonably advise what would make for a reasonable settlement of the claim until after the Respondent put on the evidence she claimed to have had. This is because such evidence might have proven significantly damaging to the Applicant’s defence, or, if not filed, made for a strong defence.

39. The Representations caused the Applicant to incur costs because:

- a. the Failure to File required the Applicant’s lawyers to seek compliance with orders and attend a non-compliance hearing; and
- b. the Failure to Withdraw early on in proceedings meant that the Applicant incurred all the costs of defending a claim that the Respondent simply failed to engage in outside of filing an initial application.”<sup>18</sup>

[21] Mr Joseph Kelly submitted a witness statement which, in more detail sets out the background of the matter including exchanges between himself and Ms Jessica Bilston-Gourley as to terms of possible settlements of the claim. The summary of Mr Kelly of the history of the matter was of great assistance in compiling the background set out above.

[22] Ms Jessica Bilston-Gourley provided written submissions which were somewhat difficult to follow but can best be summarised as follows:

- She is not a lawyer or paid agent.
- She does not understand the “legal jargon”.
- She does not meet the definition of a paid agent within the meaning of s.12 of the Act.
- That she stated she was a paid agent the day of the mention hearing in a panic as she felt pressured.
- That she wrote “sister” on the Form F50.
- That she never encouraged her brother to continue or respond to the dispute and there is still an active dispute.
- She does not understand paragraph 17-29 of the Little Henri’s submissions (the section that sets out the Little Henri’s preferred interpretation of paid agent and asserts that there are anomalies in the position of Ms Jessica Bilston-Gourley).
- She has only \$2,000 in her business and personal account combined and does not have the capacity to pay.
- That it was Little Henri’s decision to choose to engage a lawyer.
- She does not know what estoppel means.
- That the Commission is not paying attention to Mr Joshua Bilston-Gourley the individual or reviewing the evidence associated with the unfair dismissal.
- That it is not true that she encouraged her brother to lodge the application. Her brother approached her and asked for help to submit the claim and she followed his directions, and that Joshua gives evidence to that effect.
- That the statement of Mr Walid Hannah contains several lies.
- That Mr Walid Hanna removed Mr Joshua Bilston-Gourley when he asked to be paid weekend penalties.
- That there is evidence of constructive dismissal.
- Refers to an SMS message sent by Mr Walid Hanna to the Applicant when he was employed which reads “Not happy someone that is 22 years old taking sickies a bit suss” as demonstrative of the stress and bullying perpetuated.
- That Mr Walid Hannah confirmed in a phone call to Ms Jessica Bilston-Gourley that he terminated Mr Joshua Bilston-Gourley.
- That she clicked “yes” by mistake on the Form F8 as she thought that was some kind of definition as the first part of the question.
- Mr Joshua Bilston-Gourley was unable to procure witness statements relevant to the substantive application as he was debilitated with mental illness.
- That in setting the directions for filing that the Commission set ridiculously short and inconsiderate timeframes which Mr Joshua Bilston-Gourley would not be able to meet thereby causing the costs claim.
- That Mr Joseph Kelly’s invoices made no sense.
- The employer created a hostile workplace environment by not paying Mr Joshua Bilston-Gourley’s statutory entitlements and that he was coerced out of the business because he exercised his workplace rights.
- Mr Joshua Bilston-Gourley has evidence for a strong claim.
- The claims the employer makes as to grievances and concerns in respect of Joshua are an excuse to justify their coercion and constructive dismissal.

[23] Mr Joshua Bilston-Gourley gave the following evidence that is relevant to the consideration as to whether Ms Jessica Bilston-Gourley is a paid agent for the application:

1. I did not pay Jessica or Positive HR any money.

2. I did not receive an invoice from Jessica or positive HR.
3. I did not engage Jessica or positive HR as a paid agent.
4. I asked Jessica as my sister to support me through Fair Work process for being terminated and bullied by Walid Hanna after asking for his wage theft to stop and for him to start paying my penalty rates and allowances.
5. I will never pay Jessica or positive HR for support with the Fair Work proceedings as she has done it for being my sister.
6. Jessica has paid me \$300.00 to help pay for my rent as I am currently on reduced work cover payments.

### **Evidence as to whether there was a dismissal**

[24] It is not necessary for the purposes of the costs application to determine whether there was in fact a termination at the initiative of the employer. However, it is necessary to examine the relevant evidence in order to form a view to whether the application had no reasonable prospects of success as Little Henri submits. The relevant evidence includes the following:

[25] There is a statutory declaration from a former employee, Ms Eliza Sparvell, which includes the following:

- ..•
4. Joshua told me at the end of his shift Walid Hanna told him not to return to work at Little Henri Cafe and that he's not wanted back.
  5. Joshua said Walid offered him two weeks of pay to leave on the spot.
  6. Joshua noted that Walid was very aggressive and yelled at him when asking him not to return to little Henri café".

[26] Mr Hanna's statement in the substantive matter was attached to the witness statement of Mr Kelly. Mr Hanna's statement includes the following:

- That Mr Joshua Bilston-Gourley was not of the expected standard, and he was disorganised, slow and messy.
- He was told to improve his performance but failed to do so.
- That Mr Joshua Bilston-Gourley could not explain why the till was low.
- That Mr Joshua Bilston-Gourley asked to be paid penalty rates, and that Mr Hanna agree to commence paying him penalty rates while also reducing his hourly rate of pay.
- That Mr Joshua Bilston-Gourley complained about the size of the free meals he was given.
- That Mr Joshua Bilston-Gourley "constantly" complained about his pay.
- that on 15 November his son Mr James Hannah covered for Mr Walid Hanna's while he was on leave and the way Joshua treated his son was upsetting.
- On 16 November Mr Joshua Bilston-Gourley would not follow the instructions.
- Importantly this statement of Mr Walid Hanna includes the following:

"14. All day on 16 November 2022 Joshua would not speak to me and kept ignoring my instructions. At 2:30 pm when Joshua finished his shift, I followed him to the lower courtyard to talk to him. I did not want to talk to him in front of the other staff. I asked Joshua if we can speak, but he said as he kept walking away that he has finished the shift and that I should have spoken to him during his shift. I followed him out to the



back gate where our car park is. I told him that this work relationship is not working for either one of us. I offered him two weeks' paid notice if he chose to leave and once again asked him to show and tell me what he thinks I owe him and I am more than willing to pay. Joshua said he didn't want to leave this job and wanted to stay. I said that things are not really working out and I preferred him to leave. Joshua became very upset and furious and threatened me with the Fair Work Commission. I said there is no need to go to Fair Work as I am willing to pay whatever he thinks I owe.

15. At 2.40pm Joshua sent me a text message asking for \$920 and two weeks' pay. This was the first time that Joshua had mentioned an amount, but I still don't understand how he worked it out. I understood that Joshua was asking me to confirm that I would pay him \$920, and 2 weeks pay if he agreed to leave. At 3:00pm I received a call from a lady called Jessica saying she is speaking on behalf of Joshua. I asked her to send me an email as I did not know who she was. At 3:07pm Joshua sent another text, this time asking why I terminated him. I did not answer him anymore as I didn't understand why he was saying I terminated his employment. At 3:22pm a long text was received from who I now understand is Joshua's sister, Jessica from 'Positive HR', threatening me with unfair dismissal. That night I kept receiving late phone calls and messaging from Jessica. I did not reply as I was extremely tired and in great pain and needed to rest. I have attached:

- a. The message I received from Joshua on 16 November 2022 (marked as WH-2); and
- b. The message I received from Positive HR on 16 November 2022 (marked as WH-3).

16. Before Joshua's sister got involved, I was discussing with Joshua what he would like to be paid if he chose to leave Little Henri, but after Jessica got involved I got a lot of messages saying I had terminated his employment."<sup>19</sup>

[27] Mr Joshua Bilston-Gourley's witness evidence at the hearing was that he was dismissed. The evidence in chief of Mr Joshua Bilston-Gourley given during the hearing included that:

- On the day of the alleged dismissal, Mr. Hanna said to him that he didn't want him back, not to come back and that he doesn't need him anymore. Further that he would pay him 2 weeks wages and that he was not welcome back and that he was fired.<sup>20</sup>
- That there were two people nearby who "obviously" heard Mr. Hanna making these statements.<sup>21</sup>
- The during the conversation, Mr Joshua Bilston-Gourley was terrified and shaking.<sup>22</sup>
- That he pleaded with Mr. Hanna to keep his job and that he loved the job.<sup>23</sup>
- That he called his big sister to ask for help and asked her to call Mr. Hanna.<sup>24</sup>
- That he asked his sister to go to Fair Work because he was "shook" from the experience.<sup>25</sup>
- He was then in bed depressed every day and could not collect the witness statements.<sup>26</sup>
- That after his Aunty died, he asked Ms. Bilston Gourley to drop the case.<sup>27</sup>
- On cross examination, Mr. Joshua Bilston-Gourley conceded that he never actually obtained any witness statements from people witnessing his termination.<sup>28</sup>

[28] Ms Jessica Bilston-Gourley with the consent of Counsel for Little Henri provided viva voce evidence on the day of the Hearing. In summary that evidence included the following:

- That her brother, Mr Joshua Bilston-Gourley came to her as his sister to help him with a Fair Work Claim.<sup>29</sup>
- The potential witnesses were too scared to come forward as they were scared as to what Mr. Hanna would do to them.<sup>30</sup>
- That on one document Ms Jessica Bilston-Gourley signed off Mr Joshua Bilston-Gourley sister and on the other she did not. That this was a complete oversight and accident because she does "...support clients with these matters".<sup>31</sup>
- Confirmed that she ticked yes on the Form F8 indicating she was a paid agent.<sup>32</sup>
- That she assumes the recording of her confirming at the Mention Hearing that she was a paid agent is accurate, but she didn't know.<sup>33</sup>
- Accepted that in the email sent by her to Mr. Kelly on 20 November 2022 that she claimed to have witness statements, but this was truthful because a statement doesn't have to be written.<sup>34</sup>
- Claimed that Mr Joshua Bilston-Gourley told her that he had written statements.<sup>35</sup>

[29] Ms Jessica Bilston-Gourley's submitted that Mr Hanna told her on the phone that Mr Joshua Bilston-Gourley had been terminated.<sup>36</sup>

[30] When it was put to Ms Jessica Bilston-Gourley that she was capable and aware of how to file materials such as statutory declarations in the Commission, she replied that she did not request those statutory declarations and that they "popped into my inbox without me requesting for those".<sup>37</sup>

## **Consideration**

### ***Is Ms Jessica Bilston-Gourley a paid agent within the meaning of the Act?***

[31] I set out earlier that Ms Jessica Bilston-Gourley selected the box on the Form F8 that she was a paid agent. She confirmed this at the Mention Hearing. These actions by Ms Jessica Bilston-Gourley clearly indicate that she at least understood herself to be a paid agent. The first time that Ms Jessica Bilston-Gourley departed from representing herself as a paid agent is when she filed the Form F50 where she stated she was the sister of the Applicant, Mr Joshua Bilston-Gourley. Ms Jessica Bilston-Gourley maintains that she is not a paid agent and claims that it was a mistake and that she was in a panic and feeling pressured.<sup>38</sup>

[32] The evidence of Mr Joshua Bilston-Gourley is that he was neither charged a fee nor paid a fee to his sister Ms Jessica Bilston-Gourley. On 2 March 2023, Ms Jessica Bilston-Gourley lodged two screenshots. One appears to be a search for Mr Joshua Bilston-Gourley, and the other a search for payments between Ms Jessica Bilston-Gourley and Mr Joshua Bilston-Gourley. Mr Joshua Bilston-Gourley's evidence is that he asked his sister to assist him with the application and to "go to fair work"<sup>39</sup>. It was not in his contemplation that she was doing so as a paid agent. I accept the evidence of Mr Joshua Bilston-Gourley on this point. He was credible in the giving of this evidence and there was no challenge to it.

[33] The definition of a paid agent has a plain meaning. Ms Jessica Bilston-Gourley did not charge or receive a fee to represent her brother. Ms Jessica Bilston-Gourley does not meet the definition of a paid agent within the meaning of the Act and therefore, there is no jurisdiction to award costs pursuant to S. 376 of the Act.

[34] I've considered the position of Little Henri to the effect that because Ms Jessica Bilston-Gourley nominated herself as a paid agent that it becomes irrelevant whether the client pays the agent or whether the agent charges a fee, and the Commission is not required to look any further into the matter.

[35] I agree that ordinarily that is the case, that the Commission is entitled to rely on the representation of the individual involved. However, in the rather unusual circumstances here the Commission is required to do so because the person involved now claims her representation of herself as a paid agent was made in error. That she was simply representing her brother without the benefit of payment.

[36] Little Henri submit that a person who is granted permission to appear as a paid agent should not escape liability for a costs order because they were not charged or received a fee as it would create "undesirable anomalies" for the Commission. I agree the scenario referred to by Counsel may theoretically enable paid agents to escape cost orders against them by not drawing bills to their client. However, in my view that would only occur in extraordinary circumstances, such as in the case here. It is a difficult task for an individual to represent themselves as a paid agent and then convince the Commission that they were not a paid agent despite representing themselves as one at first instance. As such, the undesirable anomalies referred to are unlikely to occur other than in exceptional circumstances.<sup>40</sup> The are two key aspects of this matter that make it exceptional.

[37] Firstly, Ms Jessica Bilston-Gourley is the sister of the applicant in the original matter. It is perfectly conceivable, and indeed not unusual for parties to enlist the support of an immediate family member to assist them in Fair Work Commission proceedings. In that context, the evidence of Mr Joshua Bilston-Gourley which I found to be consistent and reliable that he enlisted the services of his sister on that basis and not as a paid agent is a plausible position.

[38] The second aspect in this matter also turns on whether I accept Ms Jessica Bilston-Gourley made a mistake both on the Form F8 and during the Mention Hearing, that she was a paid agent. In contrast to her brother, Ms Jessica Bilston-Gourley was inconsistent, unreliable, and argumentative whether as a witness or as an advocate for her brother, Mr Joshua Bilston-Gourley. I have set out earlier the history of the belligerent conduct of Ms Jessica Bilston-Gourley during earlier proceedings in this matter.

[39] During the hearing on the cost's application, Ms Jessica Bilston-Gourley while giving evidence was disruptive, argumentative, unresponsive or vague in her responses.<sup>41</sup>

[40] Ms Jessica Bilston-Gourley's evidence was inconsistent with that of her brother on the issue of the existence of the additional witness statements. For example, her evidence was that the witnesses to the alleged dismissal would not give evidence out of "an extreme level of fear".<sup>42</sup> This does not align with the evidence of her brother who indicated that the witnesses

were “hard to track down”<sup>43</sup> and that he “can’t even see these people” and he “can’t go around and like put up signs trying to find these people”.<sup>44</sup> Further, with regards to the witnesses who were employees of the café “across the road”<sup>45</sup> Mr Joshua Bilston-Gourley indicated that he could not get witness statements because he was not “given enough time” and he “was in bed every day”.<sup>46</sup>

[41] Ms Jessica Bilston-Gourley’s evidence is that she “supports clients with these matters”<sup>47</sup> and that she has filled out many similar forms<sup>48</sup> (to the Form F8). On one view this is inconsistent with her claim to have made an error in selecting “YES” to the paid agent question on the Form F8. Nevertheless, I understand her point to be that she typically completes the forms when she is acting as a paid agent and simply repeated the practice on this occasion by mistake.

[42] However, Ms Jessica Bilston-Gourley, on numerous occasions made statements and engaged in conduct that demonstrated a lack of legal expertise and knowledge of the Commissions processes. These included:

- “• I don’t even understand the submissions from Mr Joseph Kelly as I am not a lawyer, so Commissioner Lee will need to explain what is written and all the legal jargon to me as I am not a lawyer, nor a paid agent so this is all foreign to me. I am a single working mum with a small business and no assets, I am not a lawyer. I will use what I do understand out of his submission to provide information too.”<sup>49</sup>
- “• When I indicated to Ms Jessica Bilston-Gourley that she had the opportunity to cross examine Mr Joseph Kelly and test him on any of his evidence, she stated “To be honest with you, Commissioner, I haven’t even read his statement, I haven’t had time. I’m not a lawyer, I wouldn’t even know what questions to ask.”<sup>50</sup>
- “• When asked about the reference to four witness statements in the substantive matter, Ms Jessica Bilston-Gourley could not understand what was being asked and asked “What does that mean? I’m not a lawyer, can you speak in just simple terms.”<sup>51</sup>

[43] When referring to sections of the Act Ms Jessica Bilston-Gourley asked if she could get an extra copy of the Act as she was “finding it hard to follow”. When I clarified that she was seeking a copy of the legislation she indicated “don’t know what section 376 and - that’s all a bit of a jumble to me, so I’m just trying to understand what’s being discussed.” When I indicated we would adjourn in order to provide Ms Jessica Bilston-Gourley with a copy of the Act she further asked, “Would it be possible for that to be simplified to me to understand what was just discussed at all?”<sup>52</sup>

[44] These statements of Ms Jessica Bilston-Gourley are inconsistent with the claims made on her publicly available website. When asked about her experience in the HR industry, Ms Jessica Bilston-Gourley stated, “You can Google me online and see my experience.”<sup>53</sup> Upon googling Ms Jessica Bilston-Gourley’s company, Positive HR which she is the founder and director of, the following claims are made:

- “• it’s like having a virtual team of HR experts who have your back, taking the legal jargon and complexities out of Industrial Relations, making it less of a headache for you.”
- “• Positive HR can investigate, mediate, and, if it comes down to it, terminate employees while remaining fair, just, and keeping you legally covered.”
- “• Professionally drafted, legally legit. Turn paperwork from a headache to easy breezy when you purchase your hr docs with us.”

[45] As Ms Jessica Bilston-Gourley is a “one man band”<sup>54</sup> then it is reasonable to assume that it is she who provides this expertise. Yet her own statements and conduct before me indicate that she lacks the skills to provide the services she claims to be able to provide. Further, Ms Jessica Bilston-Gourley has, throughout the proceeding’s demonstrated she has little understanding of the relevant legislation and has been erratic in her dealings with the Commission.

[46] In summary, the case advanced by Ms Jessica Bilston-Gourley is that she made an error in stating she was a paid agent on the Form F8 and was in a panic and pressured at the Mention Hearing. This must be balanced against the fact that she claimed that she was a paid agent, and she operates a business that purports to provide expertise in these areas. Her claimed lack of expertise and its contribution to her panic and confusion is at odds with the representations of expertise in this field on her company website. However, my observations of Ms. Jessica Bilston-Gourley lead me to the conclusion that the representations on her website are largely if not wholly inaccurate. Accordingly, I have concluded that Ms Jessica Bilston-Gourley made an error when she advised the Commission that she was a paid agent.

[47] This is a case of unique and exceptional circumstance. Ms Jessica Bilston-Gourley is the sister of the Applicant in the s.365 application. I am satisfied Mr Joshua Bilston-Gourley asked Ms Jessica Bilston-Gourley to assist him with his application in that capacity, as a family member who he thought would have some knowledge and would assist him. He may well have been better off without her assistance. Nevertheless, on the evidence, that is the basis for her involvement in this matter. It is not that of a paid agent.

[48] As Ms Jessica Bilston-Gourley is not a paid agent within the meaning of the Act it follows that a costs application cannot succeed.

### **Estoppel**

[49] The Little Henri submitted that they were entitled to rely on the Ms Jessica Bilston-Gourley’s representations that she was a paid agent and on her actions in assuming that role. Further that she should not now be permitted to depart from that assumed role and the Commission, if it does not find the above positions persuasive, should ‘estop’ the Respondent from doing so.”<sup>55</sup>

[50] I have considered whether Little Henri acted on the assumption that Ms Jessica Bilston-Gourley was a paid agent in such a way that Little Henri would suffer detriment if the assumption was not adhered to. I am not satisfied that Little Henri have relied on Ms Jessica

Bilston-Gourley representation to their detriment. Little Henri would have been induced to act in the same or similar way regardless of Ms Jessica Bilston-Gourley capacity in the matter.

[51] In support of my findings, I turn to Dixon J of *Grundt v Great Boulder Proprietary Gold Mines Limited*<sup>56</sup>

- “• In stating this essential condition, particularly where the estoppel flows from representation, it is often said simply that the party asserting the estoppel must have been induced to act to his detriment..... that purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it.”<sup>57</sup>

[52] And furthermore, the fact that Ms Jessica Bilston-Gourley rejects the assumption relied upon by Little Henri, the detriment must be real, as Dixon J follows on by stating:

- “• If the induced party is allowed to complain only if the inducing party falsifies the inducing assumption, then the only detriment, ‘the real detriment’,<sup>58</sup> to the induced party is that which would arise if the inducing party were permitted to falsify the inducing assumption, namely, by repudiating it. To the induced party, there is no possibility of his suffering any detriment in ‘a narrower sense.’<sup>59</sup>

[53] In any event, there is no legal doctrine of estoppel that generally applies to the work of the Commission.<sup>60</sup>

### **Should the Commission make an order for costs under section 376 of the Act?**

[54] Even if it were the case that Ms. Jessica Bilston-Gourley was a paid agent and I am wrong on that point, I would not grant the application for costs for the following reasons:

#### ***Were there no reasonable prospects of success of the application?***

[55] Little Henri submits that I should find the application had no reasonable prospects of success, on the basis that no evidence of dismissal existed at the time the application was made, and it ought to have been obvious that Mr Joshua Bilston-Gourley’s claim would fail that jurisdictional hurdle.

[56] This is not correct. There is evidence that Mr Joshua Bilston-Gourley was dismissed, that being the evidence of Mr Joshua Bilston-Gourley himself. Mr Joshua Bilston-Gourley maintains per the Form F8, that “The employer dismissed me for raising a workplace right on receiving the award pay”. His evidence during the proceedings before me was broadly consistent with this. Ms Jessica Bilston-Gourley claims that Mr Joshua Bilston-Gourley was dismissed from his employment during a conversation with his then employer, Mr Hanna on 16 November 2022. The evidence that Mr Hanna would have given at hearing was attached to the witness statement of Mr. Kelly, and that was to the effect that he did not dismiss the Applicant and claimed that he is still employed.

**[57]** There is clearly a contest on the facts as to whether there was termination at the initiative of the employer. To some extent this would likely turn on the credibility of the witnesses, Mr Joshua Bilston-Gourley and Mr Hanna. Further the statement of Mr Hanna clearly indicates that he told Mr Joshua Bilston-Gourley he preferred that he leave. In his witness statement Mr Hanna states “I told him that this work relationship is not working for either one of us. I offered him two weeks’ paid notice if he chose to leave and once again asked him to show and tell me what he thinks I owe him and I am more than willing to pay. Joshua said he didn’t want to leave this job and wanted to stay. I said that things are not really working out and I preferred him to leave.”<sup>61</sup> It is open to argue that Mr Hanna’s own evidence shows clearly that he was deeply unhappy with the performance of Mr Joshua Bilston-Gourley and that he wanted to end the employment relationship and told Mr Joshua Bilston-Gourley that. In any event, there is not a lot of daylight between I want you to leave, and I don’t want you to come back [Mr Joshua Bilston-Gourley version] and Mr Hanna’s evidence that he wanted Mr Joshua Bilston-Gourley to leave and was seeking to negotiate a payment in lieu of notice. The submissions there was no reasonable prospects of success is simply without foundation and is rejected. The fact that the witness statements of those who claimed to have witnessed the conversation referred to, never materialised does not change that position.

***Were there unreasonable acts and admissions by Ms Jessica Bilston-Gourley?***

**[58]** The unreasonable acts said to have been engaged in by the Applicant where to make representation that witnesses to the dismissal had been obtained and that “witnesses evidenced this [dismissal] and we have statements”.

**[59]** It is clear from the evidence that Ms Jessica Bilston-Gourley had not secured statements from individuals who witnessed the dismissal, and this statement was not true.

**[60]** The evidence is that Mr Joshua Bilston-Gourley did not obtain the witness statements as “it’s hard to track down people like I can’t like find”<sup>62</sup> that he “can’t go around and like put up signs trying to find these people”<sup>63</sup> and that he “wasn’t given enough time. I was in bed every day.”<sup>64</sup> Mr Joshua Bilston-Gourley further indicated that he was unwell and could not obtain any witness statements (other than that already provided by Ms Eliza Sparvell)

**[61]** As to the omissions said to have been engaged in by Ms Jessica Bilston Gourley these are said to be:

- a. failing to file her client’s evidentiary material as ordered by orders dated 20 December 2022, or at any other time (“the Failure to File”);<sup>65</sup>
- b. failing to provide medical evidence justifying an extension as ordered by orders dated 31 January 2023 (“the Failure to Produce”); and
- c. failing to withdraw her client’s claim in a timely fashion (“Failure to Withdraw”). There was no reason the claim could not have been withdrawn far earlier in proceedings – the Applicant’s (to proceedings) claim never improved so whatever reason the Respondent had for withdrawing the claim, was a reason that existed on the commencement of the claim.”<sup>66</sup>

[62] I'm not satisfied there was a failure to withdraw in a timely fashion having regard to all the circumstances. For the reasons set out earlier the Mr Joshua Bilston-Gourley's case was not without prospects of success irrespective of whether there were additional witnesses. Mr Joshua Bilston-Gourley ultimately withdrew from the proceedings because he "just couldn't take it anymore because it's just too hard, there's just too much going on."<sup>67</sup>

[63] While I am satisfied that Ms. Jessica Bilston-Gourley made false representations as to the additional witnesses' statements were claimed to exist, I don't accept that it made any significant difference to the material Little Henri had to prepare, which was essentially the witness statement of Mr Hanna and the submissions. Mr Hanna's witness statement and the submissions would have had to be prepared in any event to advance the case there was no dismissal, irrespective of whether there were other witnesses. Therefore, while I am satisfied that the misrepresentation of the existence of additional witness statements was an unreasonable act, I am not satisfied that this caused the costs to be incurred as is contemplated in s. 376 of the Act.

[64] The decision to award costs under section 376 of the Act is subject to strict conditions. Section 376(2)(a) provides power to the Commission to award costs against a lawyer or paid agent only if it is satisfied that the lawyer or paid agent 'encouraged' a person to start, continue or respond to the dispute when it should have been reasonably apparent that there were no reasonable prospects of success. I am not satisfied for the foregoing reasons that there were no reasonable prospects of success.

[65] In respect to s.376(2)(b) while Ms. Jessica Bilston-Gourley engaged in an unreasonable act in claiming to have witness statements when she did not, I do not for the foregoing reasons accept that act caused Little Henri to incur costs that they would not have incurred in any event.

[66] Therefore, even if I was satisfied that Ms Jessica Bilston-Gourley was a paid agent, I do not consider the circumstances exist to enliven the powers and the discretion of the Commission to award costs.

### **Conclusion**

[67] For the above reasons, the application for costs must be dismissed. An order to that effect will be issued with this decision.<sup>68</sup>



COMMISSIONER



*Appearances:*

Mr J Kelly *of* The Trustee for Hanna 5 Trust trading as Little Henri

Mr Joshua Bilston-Gourley *of* The Trustee for B Positive trust Trading as Positive HR Pty Ltd and with *permission* Ms Jessica Bilston-Gourley *on behalf* of The Trustee for B Positive trust Trading as Positive HR Pty Ltd

*Hearing details:*

Melbourne (by video)  
16 June 2023

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<sup>1</sup> Form F8A Response to general protections application.

<sup>2</sup> See *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152 and *Ahmad v MPA Engineering Pty Ltd* [2020] FWCFB 5365).

<sup>3</sup> PN24.

<sup>4</sup> PN30.

<sup>5</sup> PN17 – PN22.

<sup>6</sup> PN59.

<sup>7</sup> PN49.

<sup>8</sup> PN47. PN51 of 15 December 2022

<sup>9</sup> PN65

<sup>10</sup> PN17-PN40.

<sup>11</sup> PN47.

<sup>12</sup> PN48 – PN49.

<sup>13</sup> [2023] FWC 935.

<sup>14</sup> P.17 of the Witness Statement of Walid Hanna dated 20 January 2023

<sup>15</sup> P. 8 of the Witness Statement of Joseph Kelly, dated 10 May 2023

<sup>16</sup> P. 10 of the Witness Statement of Joseph Kelly, dated 10 May 2023

<sup>17</sup> P. 22 of the Witness Statement of Joseph Kelly, dated 10 May 2023

<sup>18</sup> APPLICANT'S OUTLINE OF SUBMISSIONS 10 May 2023

<sup>19</sup> Witness Statement of Walid Hanna at [14]-[16].

<sup>20</sup> PN209.

<sup>21</sup> PN210.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> PN215

<sup>25</sup> PN216.

<sup>26</sup> Ibid.

<sup>27</sup> PN217.

<sup>28</sup> PN243.

<sup>29</sup> PN267

<sup>30</sup> PN269

<sup>31</sup> PN274

<sup>32</sup> PN297-PN307

<sup>33</sup> PN316

<sup>34</sup> PN321 -PN342

<sup>35</sup> PN341

<sup>36</sup> Jessica Bilston-Gourley's outline of submissions.

<sup>37</sup> PN364

<sup>38</sup> Jessica Bilston-Gourley's outline of Submissions.

<sup>39</sup> PN216

<sup>40</sup> Applicants outline of submissions at [22]

<sup>41</sup> PN298-PN305, PN320

<sup>42</sup> PN270.

<sup>43</sup> PN227.

<sup>44</sup> PN226-PN228

<sup>45</sup> PN221

<sup>46</sup> PN235

<sup>47</sup> PN274

<sup>48</sup> PN295

<sup>49</sup> Jessica Bilston-Gourley outline of submissions.

<sup>50</sup> PN161-PN162

<sup>51</sup> PN357

<sup>52</sup> PN404-419.

<sup>53</sup> PN181

<sup>54</sup> PN280.

<sup>55</sup> Applicants outline of submissions at [25] and [26].

<sup>56</sup> (1937) 59 CLR 641.

<sup>57</sup> (1937) 59 CLR 641 at 674-675.

<sup>58</sup> Ibid (1937) at 674.

<sup>59</sup> *Commonwealth v Verwayen* (1990) 170 CLR 394 at 415 (per Mason CJ)

<sup>60</sup> *Caruana, Robert v Shace Toop Trading Trust T/A Toop & Toop Real Estates* [\[2028\] FWC 3078](#), DP Anderson at [50]-[52].

<sup>61</sup> Witness statement of Walid Hanna at [14].

<sup>62</sup> PN227

<sup>63</sup> PN228

<sup>64</sup> PN235

<sup>65</sup> P. 22 of the Witness Statement of Joseph Kelly, dated 10 May 2023

<sup>66</sup> Applicant's Outline of Submissions at [36]

<sup>67</sup> PN217

<sup>68</sup> [PR765251](#)